MASRAN MANSOR

v.

PUBLIC PROSECUTOR

HIGH COURT, BRUNEI
AM MCMULLIN (COMMISSIONER)
[CRIMINAL APPEAL NO. 14 OF 1991]
3 DECEMBER 1991

CRIMINAL PROCEDURE: *Conviction for two offences - Section 427 Penal Code and s. 29(1) Public Order Act Cap. 148 - Mitigation - Discretion to release offender on probation - Criminal Procedure Code s. 263 - Whether discretion exists under Interpretation and General Clauses Act - Penalty prescribed by law imprisonment and whipping - Whether proper case for probation - Accused has previous conviction for attempted theft.*

This case is an appeal against the sentence imposed by the Magistrate. The appellant pleaded guilty to two offences, one under s. 427 of the Penal Code for wrongful damage and one under s. 29(1) of the Public Order Act (Cap 148) for possession of an offensive weapon.

Section 427 provides as punishment imprisonment for a term which may extend to 5 years and whipping with not less than 2 strokes.

The counsel for the appellant claimed that the sentence imposed on the appellant should be a probationary order, since the court had a discretion to substitute a probationary order under the provisions of s. 263 of the Criminal procedure Code where there is a conviction under s. 427 of the Penal Code.

The public prosecutor on the other hand quoting s. 38(1) and (2) of the Interpretation and General Clauses Act argues that no such discretion exists.

The mitigating factors are that the appellant was of a youthful age and had pleaded guilty. However he had a previous conviction for attempted theft in a building where he had been bound over.

Held:

[1] Where the Court decided to impose a term of imprisonment it must, in addition impose also punishment further as is provided by the section under which the offender has been convicted within whatever limits as to quantum.

[2] The Court has a discretion in relation to the offence of which the conviction was given and the appropriate sentence passed unless the intention to withold from the Court the power to resort to probation in respect of any offence or class of offence is made manifest in the legislation.

[3] However, based on the facts, this is not a proper case for probation as the offender was already bound over for a previous conviction for attempted theft.

[Appeal allowed in regard to sentence of imprisonment. Order for strokes remain unchanged.]

Legislation referred to:
Criminal Procedure Code [Brunei], s. 263
Interpretation and General Clauses Act (Cap 4) [Brunei], ss. 38(1), (2), 39
Penal Code [Brunei], ss. 380, 427
Public Order Act (Cap 148) [Brunei], s. 29(1)

For the public prosecutor - Ivan Leong
For the appellant - Feridahanam; M/s. D.F. Abang Zen

JUDGMENT

AM McMullin (Commissioner):

The appellant Masran Bin Mansor was convicted before a Magistrate, on his own pleas, of two offences. The first was an offence of a wrongful damage taken under s. 427 of the Penal Code and the second of being in possession of an offensive weapon contrary to the provisions of s. 29(1) of the Public Order Act Cap. 148.

The appellant is a very young man, just over 18 years and 3 months. He is married. He has a child of 7 months and his wife is once again pregnant. At the moment she is living with her parents and the child is with the appellant's parents. He has been in custody since his conviction.

These offences arose out of an incident on 3 September 1991, when the appellant took a rather unusual course in pursuing a debt owed to him by another person, Mussaddad Bin Hj. Ali. On that day, between 7 and 7.30 p.m in the evening, he went with a friend driven by himself in his own motor car to a place where he parked close by the car owned by the complainant in the case. This was next to something that has been referred to as a Snooker House, where he expected to find his debtor.

He found his debtor and they repaired outside to pursue the matter of the debt. The discussion turned into an argument and the argument turned into a fight.

The complainant took to his heels and ran back to the Snooker House hotly pursued by the appellant. Seeing the appellant approach, obviously in a state of high excitement, the complainant's friend, Mr. Lee Eng Lee, slammed the door to and locked it. This further enraged the appellant who ran back to his own motor car from the boot of which he took a weapon, which has been described as a homemade Samurai sword, and went back once more to the Snooker House. His intention clearly was to compel the repayment of his debt by the use of this weapon in some unspecified way.

Finding the door still locked, and therefore being unable to enter with his weapon, he returned, still obviously enraged, to where his car was parked beside the complainant's car and there, using a belt with a buckle to it, he smashed the rear right window glass of the complainant's car. This act constitutes the substance of the first charge. Ultimately, the damage to that vehicle was estimated at B$250.

A report was made on the same evening and shortly before midnight on the same day he was arrested and taken into custody and, having admitted the offences, he was later brought to Court where he pleaded guilty to both charges.

At the outset of the hearing of this appeal I expected to be dealing only with such customary aspects of all such appeals against sentence as relate to quantum and mitigation, record and the like. I had assumed that the law relating to any proposed alternatives to the sentences imposed would have been, by this time in Brunei, sufficiently well established as to leave no doubt about the legality of what was being proposed by Ms. Abang Zen, Counsel for the appellant, that is to say a probationary order.

To my surprise however I was made aware that this is a question which is still under debate and thought to be undecided although, as will appear from what I must say later, I do think that the point has already been settled.

It is, however, to that point that I must turn first before dealing with the merits of the prisoner and the scale of the punishment.

The question relates to the charge laid under s. 427 of the Penal Code which provides that:

> Whoever commits mischief, thereby causes loss or damage to the amount of B$25 or upwards, shall be punished with imprisonment of either description for a term which may extend to 5 years and with whipping with not less than 2 strokes.

Ms. Abang Zen for the appellant maintains that in respect of a conviction under this section a discretion exists to substitute a probationary order under the provisions of s. 263 of the Criminal Procedure Code.

Mr. Ivan Leong, the public prosecutor, for the respondent, says that no such discretion exists by reason of the provisions of s. 38 of the Interpretation and General Clauses Act as amended by Emergency (Interpretation and General Clauses Act) (Amendment) (No.2) Order 1988:

> 38(1) Whenever, in or by virtue of the provisions of the law specified in the schedule, more than one penalty is prescribed for an offence, the use of the word "and" shall signify that the penalties shall be inflicted cumulatively.

What this means, Counsel says, is that where, as in s. 427, there is provision for more than one penalty, and the section creating the offence does not provide for the penalties to be alternative to each other at the option of the Court, then the Court's hands are bound and every such penalty must be imposed within whatever limits as to quantum may be provided by the law.

In the case of s. 427 therefore probation he says is not an option and imprisonment of some degree, together with the mandatory 2 strokes, must be inflicted. He contrasts with the first subsection of s. 38, the provisions of subsection 2 which are as follows:

> (2) Whenever, in or by virtue of the provisions of any written law other than the provisions of the law specified in the schedule, more than one penalty is prescribed for an offence, the use of the word "and" alternatively or cummulatively.

This provision, Counsel says, secures to the Court a discretion to apply to any offender convicted of an offence, which is not among those listed in the schedule, any of the punishments provided in the section itself or any such alternative punishment as may be available to the Court by virtue of any other provisions of the law apart from the section under which the charge has been laid. Probation in such a case is therefore an available option.

To all of this Ms. Abang Zen replies that the provisions of s. 38(1) simply mean that once the Court has decided to impose a term of imprisonment then it must, in addition, impose also whatever other penalty is provided by the section under which the offender has been convicted, within whatever limits as to quantum may be open to it. Section 38(2) permits the Court to choose among the penalties provided by section creating the unscheduled offences.

In the present case this means that the sentence of imprisonment, once imposed, was necessarily augmented by the prescribed number of strokes. But, she says, the Court was not bound to impose a term of imprisonment.

Both sides have referred me to, and variously enlisted the judgment of Sir Denys Roberts CJ in Criminal Appeal No. 9 of 1991 Ak. *Shaminan Bin Pg Abd Rahim v. Public Prosecutor.*

The appellant in that case had been convicted by a Magistrate of theft in a building contrary to the provisions of s. 380 of the Penal Code as amended by the Emergency (Criminal Procedure Code) (Amendment) Order 1988 which is in the following terms:

> 380. Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property shall be punished with imprisonment of either description for a term which may extend to 7 years.

The Public Prosecutor had submitted that these provisions meant that the Court had no discretion and that imprisonment must follow upon conviction. Dealing with this proposition the learned Chief Justice said:

This does not appear to be correct, as s. 39 of the Interpretation and General Clauses Act (Cap. 4) provides as follows:

> whenever, in or by virtue of any written law a penalty, whether of imprisonment or fine, is prescribed for an offence the same shall imply:
>
> (a) that such offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed.
>
> If the prosecution were correct, it would mean that s. 263 CPC, which provides for the release of an offender on probation would be of no effect since this section applies wherever "a person has been convicted of any offence."

It will be seen that, from the provision of the additional punishment of whipping, the formula employed in the creation of the punishment in s. 427 is precisely the same as that in s. 380, that is the condemnatory phrase "shall be punished with imprisonment ... etc." appears in both sections, and indeed it is this very formula which reappears with unfailing regularity throughout the Code whenever punishment is being prescribed.

Mr. Leong, however, directs my attention to what was said in the same case by the Chief Justice immediately after the words I have quoted earlier:

> save for any section which provides for a minimum punishment to be imposed, or where the sentence is fixed by law, as in the case of murder, the Court will retain its discretion, and can impose any term of imprisonment up to the maximum, or no term of imprisonment at all in a proper case.

Mr. Leong argues that imprisonment of some degree is a mandatory minimum sentence in s. 427 or indeed in any section, similarly framed, provided that it is also among the sections listed in the schedule to the Emergency (Interpretation and General Clauses Act) No. 2 Order 1988 and he points out that s. 380 with which the Court was concerned in Criminal Appeal No. 9 of 1991, is not so listed. And here he refers to an earlier passage in the judgment of the Chief Justice in Criminal Appeal No. 9 of 1991 to support his argument. That is as follows:

> There has clearly been a misprint in s. 380. The words "or with a fine, or with both" ought to be added at the end of the section, as they have in the same section in the Indian Penal Code, on which the Brunei section is based.

I do not think that helps him. The 1988 amendments to s. 380 do not contain any such words. I cannot say what argument was presented to the learned Chief Justice in that regard, but Ms. Abang Zen in the present case has not sought to persuade me that such words are to be imported into s. 427 on the basis of any similar legislation elsewhere and, for my own part, I do not think that this passage in the judgment of the learned Chief Justice is of relevance to what he said later in the passages quoted by me above.

I can see no warrant for any implication that the absence of such words from s. 427 fortifies Counsels argument in relation to s. 38(1) of the Interpretation and General Clauses Act.

The "minimum punishment" to which Sir Denys Roberts was referring, can, to my mind, only mean such minimal punishments as occasionally are spelt out specifically in various kinds of criminal statutes, and which are exemplified by such express provisions as, for example, minimum fines, minimum terms of imprisonment or indeed, as in the present case, minimum number of strokes.

I think therefore that Counsel for the appellant in the present case is right in this matter, and that the true interpretation of s. 38(1) of the Interpretation and General Clauses Act is that where the Court decides to impose a sentence of imprisonment, it must in addition impose such further punishment as is provided by the section under which the charge has been laid if that section is among the scheduled sections.

If the Court is dealing with a section which provides more than one penalty but is not one of the scheduled sections, then, under the provisions of s. 38(2), it is at liberty to select among the penalties provided in the section and to impose one such penalty without being obliged to impose any other which may have been provided by the same section.

The opening words of s. 263 of the Criminal Procedure Code:

> When any person not being a youthful offender has been convicted of any offence punishable with fine or imprisonment before any Court etc.

are words of perfectly general application, not limited in any way by reference to any special exception or exceptions, and I cannot read the law as it stands as limiting the power of the Court to resort to those provisions in a fitting case. If it is the intention to withold from the Court the power to resort to probation in respect of any offence or class of offences then I think that intention must be made manifest in the legislation.

Likewise, I regard what was said by the learned Chief Justice in the passages quoted above in the concluding part of his judgment as of general import in relation to all offences within the purview of s. 263 of the Criminal Procedure Code; unless expressly excluded therefrom by some specific provision elsewhere in the law.

Mr. Leong concedes that there is no question but that the Court does have a discretion in relation to the offence of which the appellant was convicted under s. 29(1) of the Public Order Act, but he maintains that the circumstances of the case generally are too grave to admit of such treatment.

I have considered the various authorities which have been cited to me by Counsel for the appellant in the course of her very careful and helpful submission, but I agree with Mr. Leong that this is not a proper case for probation. That remedy has been tried once already with this appellant. This came out late in the hearing of the appeal by the production of his record, which appears to have been overlooked at the trial level. It was put to the appellant and he agreed that there was a previous conviction, for attempted theft in a building, for which he was bound over.

In my view the public order offence of which has now been convicted, and to which the criminal damage offence is little more than a disgraceful epilogue, is of a character sufficiently grave to warrant custodial treatment. The appellant's youthful age and his pleas of guilty are, to my mind, the only two substantial mitigating factors.

To these I give full measure of allowance, having regard to some of the passages cited to me earlier in the hearing by Ms. Abang Zen from some of the reported authorities, to which I do feel it is necessary at this stage to refer.

It would be unfortunate if any display of undue leniency on the part of this Court were to give the impression that such a method of pressing a claim for repayment of a debt, albeit a justified claim, and made under circumstances of domestic pressure, was other than totally unwarranted. Had the debtor's friend, Mr. Lee, not made his timely intervention it might well have been, considering the appellant's extraordinary loss of self control at the time, that the event would have turned out far more seriously than it did.

Neverthless, I take the view that the interests of society can reasonably be served by sustaining the orders for corporal punishment while reducing the terms of imprisonment so that the appellant's very young family may have him restored to them it is to be hoped duly and sufficiently chastened, without too prolonged a period of separation.

Notwithstanding a careful treatment of the question by the Magistrate, I think that, in the event, he did not have sufficient regard to the matter of totality. I also take into account the fact that both offences were part and parcel of the same exhibition of criminal conduct.

I therefore allow the appeal in so far as it relates to the sentences of imprisonment and I substitute for the sentences imposed by the Magistrate the following:

1st Charge, wrongful damage, 3 months

2nd Charge, possession of offensive weapon, 9 months.

These sentences are to run concurrently. The order for strokes will remain unchanged.

Also found at [1992] 2 CLJ 931